PPG Industries, Inc. *and* International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW. Case 25–RC–10347

July 3, 2007

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS SCHAUMBER AND KIRSANOW

The National Labor Relations Board, by a three-member panel, has considered objections to an election held June 28, 2006, and the hearing officer's report recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 186 for and 158 against the Petitioner, with 9 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and briefs,[1] and has decided to adopt the hearing officer's findings[2] and recommendations only to the extent consistent with this Decision and Direction of Second Election.

Background

The Employer filed a number of timely objections to the election. The Employer alleged, among other things, that several union supporters, including members of the employee-comprised voluntary organizing committee (VOC), acting as agents of the Union, made threats of physical harm and property damage to various employees. The hearing officer found that, throughout the month preceding the election, the union supporters made a number of statements to unit employees threatening physical harm and property damage if employees were to cross a picket line and that these statements were disseminated to numerous other employees. The hearing officer found that the union supporters did not act as agents of the Union and thus applied the Board's standard for evaluating third-party conduct. He concluded that the threatening statements did not create a general atmosphere of fear and reprisal and therefore recommended that all of the Employer's objections involving threats be overruled.[3]

The Employer excepts to the hearing officer's findings, contending that the VOC members and other union supporters acted as union agents and that their threats warrant setting aside the election under the Board's standard for evaluating party conduct. Alternatively, the Employer contends that even if the VOC members and other union supporters did not act as agents of the Union, the election should be set aside under the third-party standard.

For the reasons set forth below, we set aside the election and direct a second election. In doing so, we need not decide whether the union supporters, including the VOC members, acted as union agents. Even assuming they were not union agents, we find merit in the Employer's argument that the election should be set aside under the standard governing third-party conduct.

Facts

The record demonstrates that employees discussed the likelihood of strikes and picket lines in the event of unionization throughout the organizing campaign. In addition, the hearing officer's factual findings with regard to Objections 1, 2, 3, 4, 7, and 9 establish that, over the course of the campaign, members of the VOC and other union supporters made numerous threatening statements concerning what would happen to employees who would, or would be inclined to, cross a picket line. For example, 1 month before the election, employee Dave Nosko made statements on a number of occasions that he "feel[s] very sorry for anyone who crosses our picket line because we will break out your windshield, slash your tires, stone your f—ing car, [and] kick you[r] ass." Similarly, Nosko and employee Terry Hall stated that "they would slash the tires of [employee Jennifer Williams] because she looked like the type that would cross the picket line."[4]

Also in the month before the election, employee Ron Kimmel noted that the Employer might bus employees across a picket line and told a group of female employees, including bargaining-unit employees Charlotte Schmitt, Elaine Thompson, and Debbie East, "I don't want you getting hurt, but you would want to sit in the middle of the bus." Three weeks before the election, in response to employee Dave Williams' statement that he

[1] We deny the Employer's motion to strike the Union's posthearing brief because it exceeded the 50-page limit set forth in Sec. 102.69(j)(1) of the Board's Rules and Regulations. That section applies to "documents filed with the Board" and does not cover posthearing briefs filed with a hearing officer.

[2] The Employer has excepted to some of the hearing officer's credibility determinations. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We find no basis for reversing the findings.

[3] The Employer does not except to the hearing officer's recommendations that Objections 6, 12, and 15 be overruled.

[4] The hearing officer did not make a finding regarding when this statement was made, but the record indicates that it was made about 3 weeks before the election.

would cross a picket line, employee Brett Johnson referenced a backhoe and said several employees "could dig a hole back there on the back of [another employee's] property where nobody could find [Williams]."

Ten days before the election, employee Roger Coleman told employee Karen Sutton that he would physically harm her and damage her vehicle if she crossed a picket line. Two days before the election, employee Jeff Birchler told his brother, employee Jerry Birchler, not to cross a picket line or "there would be big problems."

Several of the foregoing threats were disseminated to other unit employees. All told, a total of 29 employees either directly heard these threats or learned of them.

Analysis

Third-party threats rise to the level of objectionable conduct where they are "so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).[5] In assessing the seriousness of such threats, the Board considers (1) the nature of the threat itself; (2) whether the threat encompassed the entire bargaining unit; (3) whether reports of the threat were widely disseminated within the unit; (4) whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and (5) whether the threat was "rejuvenated" at or near the time of the election. Id. Applying these factors, the Board has found objectionable multiple threats of harm, physical injury, and property damage against proemployer employees or employees who stated that they would cross a picket line. *Robert Orr-Sysco Food Services, LLC*, 338 NLRB 614, 615–616, enfd. mem. 184 Fed. Appx. 476 (2006); *Picoma Industries*, 296 NLRB 498, 500 (1989).

The threatening statements at issue in Objections 1, 2, 3, 4, 7, and 9 were serious in nature, involving threats of bodily harm and property damage. The record reflects that the threat of serious consequences for employees who would not choose to support a union strike was a consistent theme throughout the election period and continued in the days leading up to the election. The threats were not isolated, but rather directly involved seven employees and were disseminated to at least 22 additional employees. Employee Nosko made a generalized threat of physical harm and property damage to *any* unit employee who crossed a picket line. The remaining threats, while addressed to specific employees, could reasonably cause any unit employee who would cross a picket line to fear the same serious consequences. See *Picoma Industries*, supra at 499.

Based on the foregoing and consistent with precedent, we find that this series of statements threatening physical harm and property damage to employees who crossed a picket line created a general atmosphere of fear and reprisal that rendered free choice in the election impossible. See *Robert Orr-Sysco Food Services*, supra at 615–617; *Marmon Group, Inc*., 275 NLRB 652, 653 (1985). In doing so, we distinguish this case from *Cal-West Periodicals*, 330 NLRB 599, 600 (2000), on which the Union relies. In *Cal-West*, we found that a single conversation containing two allegedly threatening statements, which were only heard by one individual, was insufficient to create a general atmosphere of fear and reprisal that would warrant setting aside the election at issue. Id.; see also *Robert Orr-Sysco Food Services*, supra at 615–616 (discussing the Board's decision in *Cal-West*). Here, by contrast, the VOC members and other union supporters made multiple statements threatening physical harm and property damage. The recurring and pervasive nature of these serious threats throughout the critical period, combined with their application to the entire bargaining unit and dissemination to numerous employees, created a general atmosphere of fear and reprisal that warrants the setting aside of the election.[6]

Conclusion

We find that the series of threatening statements at issue in Objections 1, 2, 3, 4, 7, and 9 created a general atmosphere of fear and reprisal that rendered free choice in the election impossible. Accordingly, we set aside the election and direct a second election.[7]

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending imme-

[5] Member Kirsanow finds it unnecessary here to address the validity of the *Westwood Horizons Hotel* standard because, even assuming an objecting party in a third-party threat case ought to bear the burden of demonstrating a "general atmosphere of fear and reprisal," he finds that the burden was met in this case.

[6] Chairman Battista and Member Schaumber agree that the extant formulation of the "third-party" standard has been satisfied. Accordingly, they do not apply their more stringent test, i.e., where third-party misconduct affects a determinative number of voters, it warrants setting aside the election. See, e.g., *Accubuilt, Inc*., 340 NLRB 1337, 1339 fn. 6 (2003). In any event, because the misconduct affected 29 unit employees, a determinative number, the election would be set aside under that test.

[7] As we have set aside the election on these grounds, we find it unnecessary to pass on the hearing officer's recommendations to overrule Objections 5, 8, 10, 11, 13, 14, 16, 17, 19, 20, and 21.

diately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the first election and who retained their employee status during the eligibility period and their replacements. *Jeld-Wen of Everett, Inc.*, 285 NLRB 118 (1987). Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Co*., 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. July 3, 2007

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Robert J. Battista, Chairman

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Peter C. Schaumber, Member

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Peter N. Kirsanow, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD